Here, however, the rights of the parties are affected by reason of the provisions of the Debtor and Creditor (Occupation Period) Ordinance. By reason of section 6 of that Ordinance the debt falls to be revalued in accordance with the Schedule as on 12th August, 1945, and as the amount of it when so revalued is less than $100, nothing whatever is payable in respect of it.

The defendants then are entitled to possession of the land forming the subject of the agreement. The question of the date as at which they are entitled to possession is by no means free from doubt. As, however, there is no claim for an account of profits I do not find it necessary to consider the point and the order will therefore be for possession with effect from 12th March, 1951, the date of the filing of the Plaint in Civil Suit No. 138 of 1951.

There remain to be disposed of three minor matters arising out of the agreement between the parties.

In the first place, the agreement of 13th December, 1944, provided that the plaintiff or any tenants occupying under him the land forming the subject of that agreement should have the right to take water from a neighbouring house belonging to the defendants subject to payment of a proportion of the water rate to be agreed with the defendants. The plaintiff alleged that the defendants had refused to allow his tenants to use the water as thus provided and that he had thereby suffered loss and damage at the rate of $5 per month, that figure, according to him, being difference between the rent he actually received and the rent he would have received had the tenants been at liberty to use the water from the defendants' premises. The 1st defendant denied that he had ever prevented the plaintiff's tenants from drawing water on his premises and on this point I accept his evidence.

In the second place, the agreement provided that the defendants should carry out any repairs which the premises required as at 13th December, 1944, but that any subsequent repairs should be done by the plaintiff at his own expense. In this connection, the defendants claimed the sum of $147.85 in respect of repairs carried out by them to the latrines on the premises. As, however, there was no evidence that these repairs were not necessary as at 13th December, 1944, the claim in this connection must fail.

In the third place, the defendants claimed to be entitled under the agreement to a refund of a proportional amount of the total amount paid by them by way of quit rent and Town Board Assessment in respect of the whole of the land of which the portion of the land forming the subject of the agreement between the parties is a part. This claim has not been contested. There is, however, a lack of evidence as to the amounts involved and there will therefore be an inquiry as to the amount payable which should be one-fourth of the total amonnt paid by the defendants in respect of the period 13th December, 1944 to 12th March, 1951.

There will, then, be judgment for the defendants in Civil Suit No. 106 of 1951. In Civil Suit No. 138 of 1951 there will be judgment for the plaintiffs for possession of the land in question as against the defendant as on 12th March, 1951, and judgment for so much as may be found due to them on enquiry by the Assistant Registrar in respect of quit rent and assessment as I have already indicated.

As regards costs, these have been substantially increased by reason of the plaintiffs in Civil Suit No. 138 of 1951 instituting that suit instead of proceeding by way of counterclaim in Civil Suit No. 106 of 1951. I think justice will be done in this connection by making no order as to costs in Civil Suit No. 138 of 1951 and giving the defendants the taxed costs in Civil Suit No. 106 of 1951.

*Judgment accordingly.*

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## PUBLIC PROSECUTOR v. YEW YONG KONG.

[A. Cr. J. (Buhagiar, J.) November 24, 1952]

[J.B. — Criminal Appeal No. 21 of 1952]

*Trade and Customs Enactement Johore, s. 29, 33, 34 and 35 — Forfeiture of vehicle — Criminal Procedure Code s. 407.*

In this case the Public Prosecutor appealed against an order of the learned Magistrate, whereby a van which had been used for conveying uncustomed goods, was ordered to be returned to the owner. The order was made after an enquiry which was held by the learned Magistrate in which the owners of the van were asked to show cause why it should not be forfeited.

**Held:** (1) as the Trade and Customs Enactment contains special provisions relating to forfeiture, the provisions contained in section 407 of the Criminal Procedure Code did not apply; (2) the learned Magistrate had therefore no power to order the return of the van to the owners.

*Cases referred to:—*

(1) *Tan Lian v. R.* (1947) M.L.J. 196.

(2) *Lim Geok Ching v. Public Prosecutor* (1952) M.L.J. 113.

(3) *Soon Chee Keng v. Public Prosecutor* (1951) M.L.J. 86.

CRIMINAL APPEAL.

*T. A. Hepworth* (D.P.P.) for the Public Prosecutor.

*Sardon Jubir* for the respondent.

*Cur. Adv. Vult.*

**Buhagiar, J.** : — This is an appeal by the Public Prosecutor against an order made by the learned Magistrate, Johore Bahru, that van SA 8445 be returned to the owner, that is the firm carrying on business under the style of Hock Ban Chuan Kee Sauce Factory of 145, Upper Serangoon Road, Singapore.

The facts are briefly as follows: One Yew Yong Kong was charged with knowingly concerned in conveying uncustomed goods in van SA 8445 with intent to defraud the Government of duties thereon, an offence punishable under section 39(i) (f) of the Trade and Customs Enactment No. 80. The offence is alleged to have been committed on the 19th March, 1951, on which date the van was seized. Yew Yong Kong was convicted and fined $17,000 and ordered to undergo 12 months rigorous imprisonment in default.

On the 20th November and the 19th December, 1951, an enquiry was held by the learned Magistrate in which the said firm, being the owners of the van, was asked to shew cause why it should not be confiscated. On the 9th April, 1952, the learned Magistrate ordered that the van be returned to the owners. The Public Prosecutor appealed against that order on the ground, mainly, that the owners had not shewn cause. This was argued before me, but a further point was also argued, that is as to the authority of the learned Magistrate to hold the said enquiry.

The practice of holding an enquiry in which the owner of a vehicle used in the commission of an offence under the Trade and Customs Enactment is asked to shew cause why the vehicle should not be confiscated seems to have had its origin in the judgment in the case *Tan Lian v. Rex*[1] where Murray-Aynsley, C.J., said:—

"Before exercising this power of forfeiture the Court should, where it is practicable, give the owner of the property concerned an opportunity of showing cause why the order should not be made."

That judgment was from an appeal against forfeiture consequent upon a contravention against an Essential Regulation which did not expressly provide for forfeiture; but it was held that a general power of forfeiture arose under section 435 of the Criminal Procedure Code of the Straits Settlements (corresponding to section 407 of the Criminal Procedure Code of the F.M.S.). This principle was followed in *Lim Geok Ching & Anor. v. Public Prosecutor*[2]. It is, however, to be pointed out that the power given to the Court by section 407 of the Criminal Procedure is to be exercised "subject to any special provisions relating to forfeiture, confiscation, destruction or delivery contained in the Enactment under which the conviction was had" (see paragraph 2 of sub-section (ii) of that section).

Now, on examination of the Trade and Customs Enactment, we find:—

(a) section 29(ii) which provides that every vehicle used in the removal of any goods liable to forfeiture under that Enactment shall be liable to forfeiture under that Enactment shall also be liable to forfeiture;

(b) section 33 which provides for notice to be given to the owner of a vehicle seized when such vehicle has not been seized in the presence of the owner or his servant;

(c) section 34 which provides that a vehicle seized under that Enactment is to be taken to be forfeited and condemned unless, within one calendar month of the date of the seizure, the owner of the vehicle gives notice in writing to the Customs authorities that he claims or intends to claim the vehicle;

(d) section 35(ii) which provides that all claims for vehicles seized under that Enactment are to be tried by a civil suit.

In view of these specific provisions contained in the Trade and Customs Enactment, I do not consider that the provisions contained in the second paragraph of sub-section (ii) of section 407 of the Criminal Procedure Code apply. Sections 34 and 35 of that Enactment give the owner of any property seized under that Enactment a remedy for claiming his property and there is no provision or scope for an enquiry.

In *Soon Ghee Kong v. Public Prosecutor*[3] the Court of Appeal of the Federation of Malaya, Foster Sutton. C.J., delivering judgment said:—

"In our opinion once it has been proved to the satisfaction of a Magistrate that an offence against the Customs Enactment has been committed and that the goods were the subject matter of or were used in the commission of the offence, there are only two courses open to him under sub-section (ii) of section 106 of the Enactment; firstly to make an order that the goods be forfeited; or secondly to abstain from making any order."

The relevant provisions of the corresponding sections in the Trade and Customs Enactment of Johore are in some respects different from those of the Customs Enactment of the F.M.S., but I think the same principle laid down in the said judgment applies. There is no doubt that under section 29(ii) of the Trade and Customs Enactment, the Court may make an order of forfeiture of a vehicle used in the removal of goods liable to forfeiture. In cases where the person convicted of an offence under the Trade and Customs Enactment is also the owner of the vehicle used in the removal of goods liable to forfeiture, and there is no question of any other person being interested in the vehicle the Court would make an order of forfeiture of such vehicle. In cases where the Court considers that some person who has not connived in or facilitated the offence may be interested in the vehicle seized, then the Court should refrain from making any order and let such person exercise his rights by making a claim as provided in section 35(i) of the Enactment.

Under the provisions of section 34 such vehicle is to be taken to be forfeited and condemned *unless* the owner gives notice in writing as provided in that section. In view of the provisions of this section the Court would be exceeding its powers by holding an enquiry.

In this particular case van SA 8445 was seized on the 19th March, 1951; it is not contested that the owners thereof did not make a claim as provided in section 34. According to that section, therefore, the vehicle must be taken to have been forfeited and condemned on the 19th April, 1951, so that when the learned Magistrate held the enquiry on the 20th November and the 19th December, 1951, and ordered the release of the van, he was making an order against the express provisions of the statute.

The Trade and Customs Enactment makes provision of hard cases; such cases can be dealt with *ex gratia* under section 36 which enables the High Commissioner to order any vessel, vehicle or goods seized or detained under that Enactment, whether condemnation had taken place or not and notwithstanding the fact that any suit or claim is pending, to be released upon such terms and conditions as may be prescribed in the order.

For the above reasons, I set aside the order of the of the learned Magistrate releasing van SA 8445.

*Magistrate's order set aside.*

## LEE GUEK HON v. PUBLIC PROSECUTOR.

[A. Cr. J. (Buhagiar, J.) December 14, 1952]

[J.B. — Criminal Appeal No. 22 of 1952]

*Trade and Customs Enactment Johore, s. 39(i)(e) — Possession of uncustomed goods — Burden of Proof.*

This was an appeal against the conviction of the appellant on a charge of being in possession of uncustomed goods, to wit, a Movado watch. The defence of the appellant was that he bought the watch from a trader.

Held: as the appellant had given an explanation which showed that he did not know the goods were uncustomed he should been acquitted.

*Case referred to:—*

*Rex v. Cohen* (1951) 1 K.B. 505; 1951 1 A.E.R. 203.

*A. J. Braga* for the appellant.

*M. Suffian* (D.P.P.) for the respondent.

The facts appear sufficiently from the judgment.

*Cur. Adv. Vult.*

**Buhagiar, J.** : — This is an appeal from a decision of the learned Magistrate, Kluang, convicting the appellant on a charge for an offence punisable under section 39(i)(e) of the Trade and Customs Enactment of the State of Johore (Enactment No. 80).

The charge against the appellant was that on the 17th December, 1951, in Chop Poh Hang, No. 14 Jalan Mersing, Kluang, he was in possession of uncustomed goods, to wit eleven wrist watches. The learned Magistrate found the appellant guilty of being in possession of one *Movado* wrist watch, in respect of which duty was not paid; the appellant was acquitted in respect of possession of the other ten watches because the learned Magistrate was quite satisfied with the explanation given by the appellant as to how he came to be in possession of them. The appellant was sentenced to a fine of $130 and in default to one month's rigorous imprisonment.

I think I should state at this stage that the trial before the learned Magistrate was unsatisfactory in many respects and in ordinary circumstances I would have ordered a new trial before a new Magistrate, but in view of the fact that (a) the Public Prosecutor has not considered it necessary to appeal against the order of acquittal in respect of the ten watches and (b) this is an appeal from a retrial, I do not consider it fair to order a new trial. In this judgment I shall, except as hereinafter indicated, proceed on the evidence admitted in the trial and on the facts as found by the learned Magistrate.

The learned Magistrate based his judgment on the receipt D1 (written in Chinese characters) where the *Movado* watch is described as a "gold case watch", while in the watch in question only the rim is gold. The learned Magistrate held therefore that D1 did not cover the *Movado* watch.

The main ground of appeal was that the interpretation of Ex. D1 was not correct; the appellant applied to call evidence on the correct interpretation of the Chinese characters on this point; this I allowed and Teo Cheng Tong, Interpreter, Supreme Court, explained that D1 referred to two *Movado* "gold top" water proof watches; if it was intended to refer to a watch the whole case of which was of gold, the Chinese expression would be "kan hok" (i.e. gold shell). Mr. Braga for the appellant submitted that had the correct interpretation of Exhibit D1 been before the learned Magistrate, it is logical to assume that the appellant would not have been convicted.

The facts briefly are as follows: At about noon on the 17th December, 1951, a Senior Customs Officer, accompanied by other officers, acting on information received, carried out a search in the appellant's house. Certain invoices were found and seized and others were destroyed or thrown away. Eleven watches in respect of which it was alleged customs duty had not been paid were seized. The appellant was asked whether he had other invoices and he replied that he had not. In the